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# The SETISA Factory: Mandatory Pregnancy Testing Violates the Human Rights of Honduran Maquila Workers

Jennifer M. Swedish\*

## I. INTRODUCTION

¶1 Honduras is one of the poorest countries in the Western hemisphere.<sup>1</sup> In 2004, approximately two-thirds of the country's households lived in poverty, and forty-five percent of the population lived on less than one dollar per day.<sup>2</sup> The country faces an extremely unequal distribution of income and a high unemployment rate.<sup>3</sup> The Honduran market economy has become increasingly reliant upon textiles and clothing produced by the maquiladora industry, an industry consisting of assembly manufacturing for export, largely to the United States.<sup>4</sup> The US is Honduras's primary trading partner, and Honduras is part of the recently-enacted Dominican Republic-Central America-United States Free Trade Agreement (CAFTA).<sup>5</sup> US foreign direct investment in Honduras is valued at \$601 million, which constitutes about forty-four percent of the total foreign direct investment in the country.<sup>6</sup> The largest US investments are in the maquiladora industry; over forty percent of the maquilas are of US origin.<sup>7</sup> The Honduran maquiladora industry employs close to 125,000 people,<sup>8</sup> sixty-five percent of whom are women.<sup>9</sup>

¶2 The Southeast Textiles, S.A. (SETISA) factory in Choloma, Honduras, is a maquila factory located in the San Miguel Free Trade Zone, which produces sweatshirts,

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<sup>1</sup> CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2005: HONDURAS, *available at* <http://www.cia.gov/cia/publications/factbook/geos/ho.html> (last modified Aug. 9, 2005).

<sup>2</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, US DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2004: HONDURAS (Feb. 28, 2005), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41765.htm>.

<sup>3</sup> CENTRAL INTELLIGENCE AGENCY, *supra* note 1.

<sup>4</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 2; *Losing their Shirts: Central American and the Caribbean Face an Onslaught from Rivals*, *ECONOMIST*, Oct. 16, 2004, at 59.

<sup>5</sup> Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005).

<sup>6</sup> BUREAU OF WESTERN HEMISPHERE AFFAIRS, US DEPARTMENT OF STATE, BACKGROUND NOTE: HONDURAS (July 2005), *available at* <http://www.state.gov/r/pa/ei/bgn/1922.htm>.

<sup>7</sup> US & FOREIGN COMMERCIAL SERVICE, US DEP'T OF COMMERCE AND US DEP'T OF STATE, DOING BUSINESS IN HONDURAS: A COUNTRY COMMERCIAL GUIDE FOR US COMPANIES 27 (2004), *available at* [http://www.buyusainfo.net/body.cfm?dbf=ccg1%2Cbmr1%2Cmrsearch1&search\\_type2=glo&avar=19919&country=Honduras&logic=and&loadnav=](http://www.buyusainfo.net/body.cfm?dbf=ccg1%2Cbmr1%2Cmrsearch1&search_type2=glo&avar=19919&country=Honduras&logic=and&loadnav=).

<sup>8</sup> BUREAU OF WESTERN HEMISPHERE AFFAIRS, *supra* note 6.

<sup>9</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 2.

sweatpants, and t-shirts.<sup>10</sup> The SETISA factory has manufactured clothing for US-based companies, such as Old Navy, Polo Sport, Nautica, and Timberland.<sup>11</sup> According to a July 2005 factory disclosure report provided to the Worker Rights Consortium, the SETISA factory is currently producing University of Wisconsin apparel for an American company called Campus One Sportswear.<sup>12</sup> SETISA employs approximately 400 workers,<sup>13</sup> most of whom are young women.<sup>14</sup>

During the summer of 2003, the National Labor Committee (NLC) visited Honduras to investigate conditions at SETISA while the factory was producing sweatshirts for Sean John Clothing.<sup>15</sup> Through interviews with workers and site visits, the NLC discovered poor working conditions, including the requirement that women undergo a pregnancy test when initially hired and again after two months.<sup>16</sup> If a woman tested positive, she would not be hired or, if already employed, she would be fired immediately.<sup>17</sup>

Unfortunately, the practice of mandatory pregnancy testing in the SETISA factory was not an anomaly; female sweatshop workers are frequently the targets of sex discrimination based on their reproductive capacity. Other factories in Honduras have also required pre-employment pregnancy tests and have fired women workers when they became pregnant.<sup>18</sup> In fact, as recently as July 2005, the NLC reported that new women workers in the Alcoa and Lear plants in Honduras were compelled to submit to pregnancy testing.<sup>19</sup> In prior years, Honduran women in the maquiladora industry were subjected to far more serious abuses, such as mandatory sterilization as a condition of hiring,<sup>20</sup> injections of the contraceptive Depo Provera disguised as tetanus shots,<sup>21</sup> the dispensing of oral contraceptive pills disguised as malaria medication, and injections given to pregnant women to cause abortions.<sup>22</sup>

<sup>10</sup> Honduran Manufacturers Ass'n, Directory: South East Textiles International, S.A. (SETISA), at <http://ahm-honduras.com/directory/> (last visited Sept. 30, 2005).

<sup>11</sup> NATIONAL LABOR COMMITTEE IN SUPPORT OF WORKER AND HUMAN RIGHTS, SOUTHEAST TEXTILES, S.A. (SETISA) 1 (Oct. 2003), available at <http://www.nlcnet.org/campaigns/setisa/> [hereinafter SETISA].

<sup>12</sup> Worker Rights Consortium, Factory Disclosure Database, Factory Detail: Southeast Textiles Setisa (July 2005), available at [http://www.workersrights.org/search/index.asp?fct\\_country=Honduras&factory=Southeast+Textiles+Setisa&id=0](http://www.workersrights.org/search/index.asp?fct_country=Honduras&factory=Southeast+Textiles+Setisa&id=0).

<sup>13</sup> Honduran Manufacturers Ass'n, *supra* note 10.

<sup>14</sup> Letter from the National Labor Committee in Support of Worker and Human Rights to Sean Combs (Oct. 14, 2003), available at <http://www.nlcnet.org/campaigns/setisa/combsletter.pdf>.

<sup>15</sup> National Labor Committee in Support of Worker and Human Rights, Sean John's Sweatshops, at <http://www.nlcnet.org/campaigns/setisa/> (last visited Sept. 30, 2004).

<sup>16</sup> SETISA, *supra* note 11, at 20.

<sup>17</sup> *Id.*

<sup>18</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 2.

<sup>19</sup> NATIONAL LABOR COMMITTEE IN SUPPORT OF WORKER AND HUMAN RIGHTS, ALCOA SWEATSHOPS IN HONDURAS 1 (July 2005), available at <http://www.nlcnet.org>; NATIONAL LABOR COMMITTEE IN SUPPORT OF WORKER AND HUMAN RIGHTS, LEAR IN HONDURAS 8 (July 2005), available at <http://www.nlcnet.org>.

<sup>20</sup> INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, COUNTRY REPORTS: HONDURAS (April 2001), available at <http://iwwaw.igc.org/publications/countries/cesrhonduras.htm>.

<sup>21</sup> National Labor Committee in Support of Worker and Human Rights, Young Women in Free Trade Zones Injected with Depro [sic] Provera (1999), at <http://www.nlcnet.org/campaigns/archive/honduras/depropro.shtml>.

<sup>22</sup> WHEN CHILDREN DO THE WORK (The Working Group, 1996).

¶5 Although SETISA's practice of mandatory pregnancy testing before hiring and again after two months was not as extreme as previous abuses of maquila workers in Honduras, it was nonetheless a cause for concern. A woman should not be required to undergo a pregnancy test merely because the factory wants to avoid paying for a pregnant worker's medical expenses and government-mandated maternity leave.<sup>23</sup> Pregnancy testing as a condition of employment is a form of sex discrimination that is outlawed by both domestic law and international human rights law, yet it occurred unimpeded at the SETISA factory.

¶6 This paper will examine mandatory pregnancy testing from the perspective of international human rights law. Part II justifies the definition of pregnancy testing as a form of discrimination against women. Part III examines the evolution of international human rights law with respect to sex discrimination. In Part IV, the practice of mandatory pregnancy testing is analyzed under current international human rights law. Part V examines previous consideration of Honduras's human rights practices by UN treaty bodies and the ILO and predicts how these bodies would react to the pregnancy testing required by SETISA. Finally, Part VI offers recommendations as to how the rights of women workers can be protected more effectively, both within the context of international human rights law and outside of it.

## II. MANDATORY PREGNANCY TESTING OF WOMEN WORKERS CONSTITUTES SEX DISCRIMINATION

¶7 American scholars identify two theoretical approaches to discrimination based on sex: the differences approach and the disadvantage approach.<sup>24</sup> The differences approach defines sex discrimination as occurring when a similarly-situated person of the opposite sex is not treated the same.<sup>25</sup> According to this approach, men and women must be treated the same only when they are the same in relevant respects. Therefore, under the differences approach, a distinction based on pregnancy is not sex discrimination, because similarly situated people of the opposite sex are not favored; since there are no pregnant men, they cannot be favored.<sup>26</sup> The United States Supreme Court utilized this approach in the case *Geduldig v. Aiello*,<sup>27</sup> when it held a state program that distinguished between pregnant women and non-pregnant persons did not constitute sex discrimination, because, "[w]hile the first group is exclusively female, the second includes members of both sexes."<sup>28</sup>

¶8 In contrast, the disadvantage approach focuses not on whether differences between the sexes exist but rather on the consequences of recognizing these differences. The disadvantage approach recognizes that societal gender roles are hierarchical<sup>29</sup> and finds

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<sup>23</sup> Steven Greenhouse, *A Hip-Hop Star's Fashion Line is Tagged with a Sweatshop*, N.Y. TIMES, Oct. 28, 2003, at B1.

<sup>24</sup> See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 101-02 (1979); DEBORAH L. RHODE, *JUSTICE AND GENDER* 82-83 (1989).

<sup>25</sup> MACKINNON, *supra* note 24, at 225.

<sup>26</sup> *Id.*

<sup>27</sup> 417 US 484 (1974).

<sup>28</sup> *Id.* at 497 n.20.

<sup>29</sup> MACKINNON, *supra* note 24, at 102 ("men's roles are socially dominant, women's roles subordinate to them").

sex discrimination if a distinction based on sex would result in disadvantaging women or “reinforc[ing] gender disparities in political power, social status, and economic security.”<sup>30</sup> Under this approach, distinctions based on characteristics of men and women that cannot be compared, such as pregnancy, would immediately trigger suspicion and scrutiny.<sup>31</sup> If further examination showed that such a distinction resulted in greater social subordination of women or disproportionately burdened women based solely on sex, then it would constitute sex discrimination.<sup>32</sup>

¶9 International human rights law utilizes the disadvantage approach rather than the differences approach when defining sex discrimination. The Declaration on the Elimination of Discrimination Against Women, written in 1967, asserts that “discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.”<sup>33</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which entered into force in 1981, defines “discrimination against women” as:

any distinction, exclusion or restriction made on the basis of sex which has the *effect or purpose of impairing or nullifying* the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>34</sup>

By emphasizing the consequences of making a distinction based on sex, neither the Declaration nor the Convention requires a comparison between similarly situated men and women in order to find discrimination. Instead, these instruments state that sex discrimination exists when a distinction based on sex infringes upon a woman’s rights such that the balance of rights between men and women becomes unequal.

¶10 SETISA’s practice of mandatory pregnancy testing constitutes sex discrimination because it burdens women solely based on their biological ability to have children. The discriminatory nature of mandatory pregnancy testing lies in its consequences: a woman who tests positive either is not hired or is fired from her factory job. Terminating or not hiring a woman merely because she is pregnant serves to “reinforce gender disparities”<sup>35</sup> among men and women in Honduran society, where men are more economically secure and women account for sixty percent of the country’s unemployed.<sup>36</sup>

¶11 The gender roles of Honduran men and women are undeniably hierarchical. “In Honduras, the prevalent Latino machismo culture reigns over a weak feminist

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<sup>30</sup> RHODE, *supra* note 24, at 83.

<sup>31</sup> MACKINNON, *supra* note 24, at 118.

<sup>32</sup> *Id.* at 225.

<sup>33</sup> Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263 (XXII), art. 1, U.N. DOC. A/RES/2263 (1967) (reprinted as Document 36, in UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996 176 (rev. ed. 1996)).

<sup>34</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 3, U.N. GAOR Supp. (No. 46), U.N. DOC. A/Res/34/180 (emphasis added), *entered into force* Sept. 3, 1981 (ratified by 180 countries) [hereinafter CEDAW].

<sup>35</sup> RHODE, *supra* note 24, at 83.

<sup>36</sup> INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH, *supra* note 20.

ideology.<sup>37</sup> As a result, women's career opportunities are limited by patriarchal and discriminatory cultural attitudes and traditions.<sup>38</sup> In 2001, women comprised only thirty-six percent of the formal workforce, even though they constituted a majority of the population.<sup>39</sup> By law, Honduran employers are required to provide equal pay for equal work, but they justify lower wages for women by classifying women's work as less demanding than men's work.<sup>40</sup> Consequently, when women are able to obtain employment, it tends to be in the low-status and low-pay occupations, which is exemplified by the fact that sixty-five percent of maquiladora workers are women.<sup>41</sup> In a country where women are already at a disadvantage with respect to employment, mandatory pregnancy testing constitutes sex discrimination because imposing such a condition of employment further increases the social subordination of women.

### III. THE HISTORICAL EVOLUTION OF INTERNATIONAL HUMAN RIGHTS LAW ON SEX DISCRIMINATION

¶12 The United Nations has always insisted upon equal rights for women. When the Charter of the United Nations was signed on June 26, 1945, it established that one of the organization's three primary goals would be "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>42</sup> The preamble to the Charter affirms "the equal rights of men and women,"<sup>43</sup> and three of the Charter's articles declare the equality of rights.<sup>44</sup> Although the United Nations was not the first international organization to work to advance the status of women, its Charter was the first international legal document to explicitly prohibit sex as a basis for discrimination and to emphatically assert the equality of men and women.<sup>45</sup>

¶13 The Charter of the United Nations assigned responsibility for promoting the rights of women to the Economic and Social Council, one of the six main bodies of the United Nations.<sup>46</sup> In February 1946, the Council created the Subcommission on the Status of Women within the Commission on Human Rights, the body responsible for the promotion of human rights.<sup>47</sup> In June 1946, the Economic and Social Council voted to make the Subcommission a separate, independent Commission on the Status of Women (CSW).<sup>48</sup> The Commission was responsible for "prepar[ing] recommendations and

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<sup>37</sup> Laura Yvonne Facusse, *Domestic Violence: What Did the Honduran Society Forget?*, HONDURAS THIS WEEK, April 15, 2002, available at <http://www.marrder.com/htw/2002apr/national.htm>.

<sup>38</sup> INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, *supra* note 20.

<sup>39</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, US DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 2003: HONDURAS (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27903.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 2.

<sup>42</sup> U.N. CHARTER art. 1, para. 3.

<sup>43</sup> *Id.* at preamble.

<sup>44</sup> *Id.* at arts. 1, 13, 55.

<sup>45</sup> Boutros Boutros-Ghali, *Introduction* to UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996 10 (rev. ed. 1996).

<sup>46</sup> *Id.* at 11-12.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> *Id.* at 13.

reports to the Economic and Social Council on promoting women's rights in political, economic, civil, social and educational fields" and "mak[ing] recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights."<sup>49</sup>

¶14 At its first session, the CSW outlined its goals, one of which was the assurance of "special consideration to women on grounds of motherhood."<sup>50</sup> According to the CSW, an essential part of this goal was the provision of maternity leave, which it referred to as "providing holidays with pay for the mother before and after birth."<sup>51</sup> In the late 1940s, the CSW began working with the International Labour Organization (ILO) to examine women's economic rights.<sup>52</sup> As a result of this collaboration, in 1951, the ILO approved the Convention on Equal Remuneration, which established the principle of equal pay for equal work.<sup>53</sup> In 1952, the CSW convinced the ILO to revise its Maternity Protection Convention to provide for twelve weeks of maternity leave rather than just six weeks.<sup>54</sup> Finally, the ILO established the Discrimination (Employment and Occupation) Convention in 1958, emphasizing the elimination of discrimination in employment based on race, color, sex, religion, political opinion, national extraction or social origin.<sup>55</sup>

¶15 The CSW had a tremendous impact on the Universal Declaration of Human Rights, adopted by UN General Assembly in 1948. The Universal Declaration is regarded as the principal human rights instrument of international law and the foundation for all other human rights treaties.<sup>56</sup> The CSW helped shape the language of the Universal Declaration, including the explicit recognition of the equal rights of women and the exclusion of what it considered to be "gender-insensitive language," like the usage of the word "men" to refer to humanity.<sup>57</sup>

¶16 Almost two decades later, the CSW played a similar role in drafting the language of other two components of the international bill of human rights,<sup>58</sup> the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both the ICCPR and the ICESCR

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<sup>49</sup> UN Econ. and Soc. Council [ECOSOC], *Resolution Establishing the Commission on the Status of Women (CSW)*, ¶ 1, U.N. Doc. E/RES/2/11 (1946) (reprinted as Document 6, in UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996 112 (rev. ed. 1996)).

<sup>50</sup> UN Econ. and Soc. Council [ECOSOC], Comm'n on the Status of Women, *Report of the CSW to ECOSOC on the First Session of the Commission, Held at Lake Success, New York, from 10 to 24 February 1947*, at II.C.3, E/281/Rev.1 (1947) (reprinted as Document 8, in UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996 118 (rev. ed. 1996)) [hereinafter *Report of the CSW*].

<sup>51</sup> *Id.*

<sup>52</sup> Boutros-Ghali, *supra* note 45, at 19.

<sup>53</sup> Convention No. 100 Equal Remuneration, General Conference of the International Labour Organization, 34th Sess., adopted May 23, 1953 (ratified by 162 countries).

<sup>54</sup> Convention No. 103 Maternity Protection, art. 3(2), General Conference of the International Labour Organization, 35th Sess., adopted June 28, 1952 (ratified by 40 countries).

<sup>55</sup> Convention No. 111 Discrimination (Employment and Occupation), art. 1(1), General Conference of the International Labour Organization, 42nd Sess., adopted June 25, 1958 (ratified by 162 countries).

<sup>56</sup> Hannah A. Saona, *The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices*, 13 PAC. RIM L. & POL'Y J. 229, 241 (January 2004).

<sup>57</sup> Boutros-Ghali, *supra* note 45, at 16.

<sup>58</sup> *Id.*

explicitly guarantee women and men an equal opportunity to exercise the rights recognized and protected by the treaties.<sup>59</sup>

¶17 In addition to helping draft the international bill of human rights, the Commission on the Status of Women wrote the Declaration on the Elimination of Discrimination Against Women.<sup>60</sup> Adopted unanimously by the General Assembly on November 7, 1967, the Declaration asserts that discrimination against women “is fundamentally unjust and constitutes an offence against human dignity.”<sup>61</sup> Although the document “amounted only to a statement of moral and political intent, without the contractual force of a treaty,”<sup>62</sup> it contained a prohibition of discrimination against women based on pregnancy, including a recommendation that countries take measures to prevent termination from employment based on pregnancy and a requirement that employers provide maternity leave.<sup>63</sup>

¶18 On December 18, 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>64</sup> arguably the most important document drafted by the Commission on the Status of Women. CEDAW, a binding treaty, pays particular attention to the human rights of women, who had been routinely discriminated against despite the affirmation of equal rights for men and women established in earlier international instruments. CEDAW requires States parties to condemn and take measures to eliminate discrimination against women in all its forms.<sup>65</sup> It reaffirms the Declaration’s assertion that discrimination based on pregnancy constitutes a form of sex discrimination and reiterates the prohibition of termination based on pregnancy as well as the maternity leave requirement.<sup>66</sup> The United Nations’ consistent emphasis on the equal rights of women and men led it to prohibit sex discrimination under international human rights law and to forbid discrimination based on pregnancy as a form of sex discrimination.

#### IV. CONSIDERATION OF MANDATORY PREGNANCY TESTING FOR FEMALE WORKERS UNDER INTERNATIONAL HUMAN RIGHTS LAW

¶19 Since its establishment, the Commission on the Status of Women has always placed a high priority on women’s economic rights, focusing on improving the status of women in the workplace through equal pay for equal work and maternity leave.<sup>67</sup> As early as 1950, however, there was concern that these efforts to improve women’s status would backfire, causing employers to terminate or refuse to hire women in order to avoid the

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<sup>59</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 3, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (ratified by 154 countries) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 3, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (ratified by 151 countries) [hereinafter ICESCR].

<sup>60</sup> Boutros-Ghali, *supra* note 45, at 30.

<sup>61</sup> Declaration on the Elimination of Discrimination Against Women, *supra* note 33, at art. 1.

<sup>62</sup> Division for the Advancement of Women, United Nations, Short History of CEDAW Convention, at <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last modified Aug. 12, 2005).

<sup>63</sup> Declaration on the Elimination of Discrimination Against Women, *supra* note 33, at art. 10.

<sup>64</sup> CEDAW, *supra* note 34.

<sup>65</sup> *Id.* at art. 2.

<sup>66</sup> *Id.* at art. 11(2).

<sup>67</sup> *Report of the CSW*, *supra* note 50.



added cost.<sup>68</sup> In 1986, the CEDAW Committee acknowledged its concern that employers would utilize pregnancy tests in their quest to avoid paying for maternity leave.<sup>69</sup> Although mandatory pregnancy testing of female employees violates provisions in CEDAW, the ICCPR, the ICESCR, and various ILO Conventions, no international body recommended explicit action against the practice until 1994.

¶20 In September 1994, the United Nations convened its fifth international population conference, the International Conference on Population and Development (ICPD), which generated recommendations to the General Assembly regarding population and development issues.<sup>70</sup> This Programme of Action declared the following four factors to be the “cornerstones” of any program related to population and development: gender equality and equity, the empowerment of women, the ability of women to control their own fertility, and the elimination of all violence against women.<sup>71</sup> The ICPD found that mandatory pregnancy testing by an employer impeded these goals and encouraged corrective measures: “Countries should act to empower women and take steps to eliminate inequalities between men and women as soon as possible by . . . [e]liminating discriminatory practices by employers against women, such as those based on proof of contraceptive use or pregnancy status.”<sup>72</sup>

¶21 The ICPD’s recommendation appears to have encouraged UN treaty bodies and the ILO to pay more attention to pregnancy testing as a condition of employment, but a force external to the international human rights community might have exerted pressure as well. In the 1990s, sweatshop labor reemerged as an issue of public concern in the United States as a result of media reports documenting the poor working conditions in factories around the world that produced goods for US consumers.<sup>73</sup> Led by non-governmental organizations (NGOs), such as Human Rights Watch and Sweatshop Watch, the anti-sweatshop movement investigated working conditions in factories abroad and attracted attention to the abuse and exploitation of workers, including the practice of requiring women to undergo pregnancy tests as a condition of employment.<sup>74</sup> Together, the ICPD’s recommendation that countries ban mandatory pregnancy testing and the sweatshop movement’s exposure of the practice in factories around the world appear to

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<sup>68</sup> The Secretary-General, *Report of the Secretary-General to the CSW on the United Nations Technical Assistance Programme in Relation to the Status of Women*, at annex (B)(1)(v), E/CN.6/145 (1950) (reprinted as Document 23 in UNITED NATIONS, *THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996* 159 (rev. ed. 1996)) (“Attempts in many countries to make [maternity leave and maternity benefits] a charge upon employers have led to the discharge or avoidance of employment of the women concerned”).

<sup>69</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Venezuela*, ¶ 279, 5th Sess., U.N. DOC. A/41/45 (Oct. 15, 1986) (an expert on the Committee asked the Venezuelan representative whether women had to undergo a pregnancy test before starting employment; the record contains no response from the representative of Venezuela).

<sup>70</sup> *Population Conference Set for 1994; Ageing, International Migration Examined (International Conference on Population and Development)*, U.N. CHRONICLE, June 1991, at 73; United Nations Population Fund, United Nations, Summary of the ICPD Programme of Action (March 1995), at <http://www.unfpa.org/icpd/summary.htm>.

<sup>71</sup> International Conference on Population and Development, ch.2, Principle 4, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action*, U.N. DOC. A/CONF.171/13 (1994).

<sup>72</sup> *Id.* at ch. 4, Action 4.4(f).

<sup>73</sup> United Students Against Sweatshops, About USAS: History, at <http://www.studentsagainsweatshops.org/about/history.php> (last visited Sept. 30, 2005).

<sup>74</sup> See e.g., HUMAN RIGHTS WATCH, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO’S MAQUILADORA SECTOR (Aug. 1996), available at [www.hrw.org/reports/1996/Mexi0896.htm](http://www.hrw.org/reports/1996/Mexi0896.htm).

have drawn the attention of the international human rights community. As a result, the mid-1990s saw increased consideration of the use of pregnancy testing as a condition of employment by the CEDAW Committee, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the ILO.

*A. The Convention to Eliminate All Forms of Discrimination Against Women*

¶22

CEDAW, the Convention to Eliminate All Forms of Discrimination Against Women, requires States parties to condemn and take measures to eliminate discrimination against women in all forms, including discrimination in the field of employment.<sup>75</sup>

CEDAW provides that States parties “shall take . . . all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”<sup>76</sup> According to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), it is not sufficient that States parties merely repeal or modify discriminatory laws; they must take action “to implement fully the Convention by introducing measures to promote de facto equality between men and women.”<sup>77</sup> The CEDAW Committee recommends that States parties undertake non-legislative measures in addition to legislative measures, such as adopting temporary affirmative action programs to increase women’s participation in education, the economy, politics and employment,<sup>78</sup> using education and public information campaigns to eliminate local prejudices against women,<sup>79</sup> and publicizing CEDAW with the help of national women’s organizations.<sup>80</sup>

¶23

Under CEDAW Article Eleven, States parties are responsible for ensuring that men and women enjoy equally the right to work, the right to economic opportunities, and the right to free choice of profession and employment.<sup>81</sup> CEDAW provides that States parties should establish maternity leave for pregnant women either “with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”<sup>82</sup> The Convention forbids employers to terminate female employees on the basis of pregnancy or maternity leave, declaring that discrimination based on pregnancy is discrimination based on sex.<sup>83</sup> In addition, the CEDAW Committee has explicitly denounced pregnancy testing as a condition of employment; in its general recommendation interpreting the Convention’s protection of women’s health care rights,

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<sup>75</sup> CEDAW, *supra* note 34, at art 2, art. 11(a).

<sup>76</sup> *Id.* at art. 3.

<sup>77</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 5: Temporary Special Measures*, 7th Sess., U.N. DOC. A/43/38 (March 4, 1988).

<sup>78</sup> *Id.*

<sup>79</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 3: Education and Public Information Campaigns*, 6th Sess., U.N. DOC. A/42/38 (April 11, 1987).

<sup>80</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 10: Tenth Anniversary of the Adoption of the Convention on the Elimination of All Forms of Discrimination Against Women*, 8th Sess., U.N. DOC. A/44/38 (March 4, 1989).

<sup>81</sup> CEDAW, *supra* note 34, at art. 11(1).

<sup>82</sup> *Id.* at art. 11(2)(b).

<sup>83</sup> *Id.* at art. 11(2).

the Committee declared mandatory pregnancy testing to be a form of coercion “that violate[s] women’s rights to informed consent and dignity.”<sup>84</sup>

¶24 In its concluding observations to the reports of States parties, the CEDAW Committee has condemned mandatory pregnancy tests as “discriminatory practices”<sup>85</sup> that violate women workers’ basic labor rights.<sup>86</sup> The CEDAW Committee has recommended that countries address this problem by implementing labor legislation that prohibits the dismissal of workers based on pregnancy and explicitly forbids the use of mandatory pregnancy tests for maquiladora workers.<sup>87</sup> When such legislation exists and yet employers still require pregnancy testing, the CEDAW Committee deems it to be “‘discrimination of effect’ as defined in article one of the Convention.”<sup>88</sup> In such situations, the Committee has urged countries to ensure enforcement of and compliance with all current legislation through measures such as promoting stronger codes of conduct for private employers, strengthening the enforcement powers of labor inspection authorities, and proactively investigating alleged violations of women’s human rights.<sup>89</sup> In addition, because women often lack knowledge of their legal rights, the CEDAW Committee has emphasized measures designed to raise awareness of women’s rights, the available means by which these rights can be enforced, and the existence of any legislation providing protection for women as workers.<sup>90</sup>

### B. *The International Covenant on Civil and Political Rights*

¶25 The ICCPR, the International Covenant on Civil and Political Rights, is the portion of the international bill of human rights dedicated to “the ideal of free human beings enjoying civil and political freedom and freedom from want and fear.”<sup>91</sup> The ICCPR requires States parties to take positive action to recognize and protect the rights established in the treaty, including the implementation of legislative or other measures to give effect to these rights, the establishment of effective remedies for people whose rights have been violated, and the enforcement of such remedies when granted.<sup>92</sup>

¶26 The Human Rights Committee, the body that monitors implementation of the ICCPR, has concluded that requiring women workers to take pregnancy tests as a condition of employment violates their rights to equality and privacy protected by Articles Three and Seventeen of the ICCPR.<sup>93</sup> Article Three calls on States parties to

<sup>84</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Women and Health (Article 12)*, 20th Sess., U.N. DOC. A/54/38/Rev.1, ch. I (Feb. 2, 1999).

<sup>85</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Dominican Republic*, ¶ 306, 31st Sess., U.N. DOC. A/59/38 (July 23, 2004) [hereinafter *Dominican Republic-CEDAW*]; Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Colombia*, ¶ 53, 20th Sess., U.N. DOC. A/54/28 (part I) (Feb. 5, 1999) [hereinafter *Colombia*].

<sup>86</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Mexico*, ¶ 441, 27b (exceptional) Sess., U.N. DOC. A/57/38 (part 3) (Aug. 28, 2002).

<sup>87</sup> *Id.* ¶ 442; *Dominican Republic-CEDAW*, *supra* note 85, ¶ 307.

<sup>88</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Guatemala*, ¶ 186, 27b (exceptional) Sess., U.N. DOC. A/57/38 (part 3) (Aug. 23, 2002) [hereinafter *Guatemala*].

<sup>89</sup> *Id.* ¶ 187.

<sup>90</sup> *Id.*; *Colombia*, *supra* note 85, ¶ 390.

<sup>91</sup> ICCPR, *supra* note 59, at preamble.

<sup>92</sup> *Id.* at art. 2.

<sup>93</sup> See, e.g., Human Rights Committee, *Concluding Comments: Poland*, ¶ 12, 66th Sess., U.N. DOC.

ensure that men and women enjoy equally the rights set forth in the treaty, and Article Seventeen protects the right to privacy, providing that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”<sup>94</sup> The Human Rights Committee issued a general comment denouncing pregnancy testing as a condition of employment on the basis that it “may interfere with a woman’s rights to enjoy privacy and other rights protected by article 17 on the basis of equality with men.”<sup>95</sup> The Human Rights Committee has also criticized mandatory pregnancy testing as an example of the lack of gender equality in employment.<sup>96</sup> When confronted with evidence of this practice, the Human Rights Committee has urged States parties to take action “to counteract these forms of discrimination against women,”<sup>97</sup> including investigating any report of mandatory pregnancy testing and “ensuring that women whose rights to equality and privacy have been violated in this way have access to remedies and to preventing such violations from recurring.”<sup>98</sup>

### C. *The International Covenant on Economic, Social and Cultural Rights*

¶27 Like the ICCPR, the International Covenant on Economic, Social and Cultural Rights is a portion of the international bill of human rights. Unlike the ICCPR, however, it does not require States parties to immediately accomplish the recognition and protection of the rights therein.<sup>99</sup> According to the Committee on Economic, Social and Cultural Rights, “the Covenant provides for progressive realization and acknowledges constraints due to the limits of available resources.”<sup>100</sup>

¶28 The Committee on Economic, Social and Cultural Rights has found that mandatory pregnancy testing as a condition of employment violates the ICESCR. The Committee has denounced the practice because it undermines women’s enjoyment of the economic, social and cultural rights protected by the Covenant.<sup>101</sup> More specifically, the Committee has condemned pregnancy testing as a violation of women’s right to work,<sup>102</sup> which includes the right to freely choose one’s work and the right to just and favorable conditions of work.<sup>103</sup> When the Committee finds evidence of the practice in States

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CCPR/C/79/Add.110 (July 28, 1999) [hereinafter *Poland*]; Human Rights Committee, *Concluding Comments: Mexico*, ¶ 17, 66th Sess., U.N. DOC. CCPR/C/79/Add.109 (July 23, 1999) [hereinafter *Mexico-HRC*].

<sup>94</sup> ICCPR, *supra* note 59, at arts. 3, 17.

<sup>95</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, ¶ 30, 68th Sess., U.N. DOC. CCPR/C/21/Rev.1/Add.10 (March 29, 2000).

<sup>96</sup> *Poland*, *supra* note 93.

<sup>97</sup> *Id.*

<sup>98</sup> *Mexico-HRC*, *supra* note 93.

<sup>99</sup> ICESCR, *supra* note 59, at art. 2(1).

<sup>100</sup> Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant)*, ¶ 1, 5th Sess., U.N. DOC. E/1991/23 (Dec. 14, 1990).

<sup>101</sup> See e.g. Committee on Economic, Social and Cultural Rights, *Concluding Comments: Mexico*, ¶ 21, 21st Sess., U.N. DOC. E/C.12/1/Add.41 (Dec. 2, 1999) [hereinafter *Mexico-CESCR*]; Committee on Economic, Social and Cultural Rights, *Concluding Comments: Dominican Republic*, ¶ 22, 15th Sess., U.N. DOC. E/C.12/1/Add.6 (Dec. 3, 1996) [hereinafter *Dominican Republic-CESCR*].

<sup>102</sup> Committee on Economic, Social and Cultural Rights, *Concluding Comments: Poland*, ¶ 14, 18th Sess., U.N. DOC. E/C.12/1/Add.26 (May 14, 1998).

<sup>103</sup> ICESCR, *supra* note 59, at arts. 6, 7.

parties, it has urged immediate action to protect women workers, such as taking legal measures against employers who require pregnancy tests.<sup>104</sup>

#### *D. The International Labour Organization*

¶29 The International Labour Organization (ILO) is a specialized agency of the UN dedicated to promoting and protecting basic labor rights. The organization establishes international labor standards through the promulgation of Conventions and Recommendations, which all 178 member States are encouraged to ratify and put into effect through national legislation.<sup>105</sup> In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which establishes an obligation of all member States, regardless of whether they have ratified the relevant Conventions, “to respect, to promote and to realize, in good faith and in accordance with the Constitution,” four fundamental principles: freedom of association and the right to collective bargaining; the elimination of forced labor; the abolition of child labor; and the elimination of discrimination in employment.<sup>106</sup>

¶30 Mandatory pregnancy testing as a condition of employment violates the ILO principle dedicated to eradicating discrimination in employment. Regardless of whether a member State has ratified Convention No. 111 Discrimination (Employment and Occupation),<sup>107</sup> the Declaration on Fundamental Principles and Rights at Work requires every member State “to respect, to promote and to realize” its prohibition on discrimination in employment or occupation based on “race, colour, sex, religion, political opinion, national extraction or social origin.”<sup>108</sup> The Committee of Experts on the Application of Conventions and Recommendations (CEACR), the legal body that monitors member States’ compliance with international labor standards, has concluded that discrimination based on pregnancy violates the Discrimination Convention because it constitutes discrimination based on sex, observing that the “discriminatory nature of distinctions on the basis of pregnancy, confinement and related medical conditions is demonstrated by the fact that up to the present time they have only affected women.”<sup>109</sup>

¶31 When considering individual member States’ reports on compliance with the Discrimination Convention, the CEACR has repeatedly denounced mandatory pregnancy testing as a condition of employment and has encouraged member States to adopt measures designed “to investigate and eliminate such discriminatory practices and thus

<sup>104</sup> *Mexico-CESCR*, *supra* note 101.

<sup>105</sup> International Labour Organization, *Constitution*, ch. 2, art. 19 (1919), available at <http://www.ilo.org/public/english/about/iloconst.htm>; International Labour Organization, Alphabetical List of ILO Member Countries (178 countries), at <http://www.ilo.org/public/english/standards/reim/country.htm> (last modified Aug. 8, 2005).

<sup>106</sup> International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, art. 2, 86th Sess. (June 1998) [hereinafter *Declaration on Fundamental Principles and Rights at Work*].

<sup>107</sup> Fifteen ILO member States have not ratified Convention No. 111 Discrimination (Employment and Occupation). International Labour Organization, Ratifications for C111 Discrimination (Employment and Occupation) Convention, 1958, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> (ILOLEX database).

<sup>108</sup> Convention No. 111 Discrimination (Employment and Occupation), *supra* note 55, at art. 1(1)(a).

<sup>109</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey: Equality in Employment and Occupation*, ¶ 41, 75th Sess. (1988), available at <http://www.ilo.org/ilolex/english/surveyq.htm> (ILOLEX database).

bring their legislation and practice into conformity with the Convention.”<sup>110</sup> Specific measures suggested by the CEACR include increasing awareness among employers and workers that mandatory pregnancy tests constitute discrimination based on sex; imposing penalties on employers who engage in such practices; and establishing procedures for employee complaints, subsequent investigations, and compensation, where appropriate.<sup>111</sup>

¶32 Although less than twenty percent of member States have ratified Convention No. 158 Termination of Employment and only six percent have ratified Convention No. 183 Maternity Protection Convention, these Conventions also help ensure that women workers are not discriminated against based on pregnancy when they are hired or fired from their jobs.<sup>112</sup> Under the Termination of Employment Convention, employers must have a valid reason to justify an employee’s termination, and the Convention explicitly states that pregnancy is *not* a valid reason.<sup>113</sup> The Maternity Protection Convention, updated in 2000, reaffirms the ILO’s commitment to providing maternity leave for pregnant employees and declares that member States should “ensure that maternity does not constitute a source of discrimination in employment.” Therefore, the Convention recommends that member States prohibit employers “from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment.”<sup>114</sup> Through the Maternity Protection Convention, the Termination of Employment Convention, and the Discrimination Convention, the ILO asserts that pregnancy testing as a condition of employment violates the basic right of women to be free from discrimination in employment.

#### V. INTERNATIONAL HUMAN RIGHTS LAW WOULD CONDEMN MANDATORY PREGNANCY TESTING AT THE SETISA FACTORY

¶33 As described in the section above, mandatory pregnancy testing violates women workers’ human rights, as defined by CEDAW, the ICCPR, and the ICESCR, and infringes upon their labor rights established by the ILO. When UN treaty bodies and the ILO previously examined Honduras’s human rights practices, they found that the country lacked appropriate protection for the human rights of women; these organizations would

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<sup>110</sup> Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation)*, 1958: Mexico (ratification: 1961), 2000, ¶ 5, available at <http://www.ilo.org/ilolex/english/iloquery.htm> (ILOLEX database) [hereinafter *Mexico-CEACR*]. See also Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation)*, 1958: Chile (ratification: 1971), 2001, available at <http://www.ilo.org/ilolex/english/iloquery.htm> (ILOLEX database); Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation)*, 1958: Brazil (ratification: 1965), 1993, available at <http://www.ilo.org/ilolex/english/iloquery.htm> (ILOLEX database); Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation)*, 1958: Colombia (ratification: 1969), 1989, available at <http://www.ilo.org/ilolex/english/iloquery.htm> (ILOLEX database).

<sup>111</sup> *Mexico-CEACR*, *supra* note 110.

<sup>112</sup> Convention No. 158 Termination of Employment, General Conference of the International Labour Organization, 68th Sess., adopted June 22, 1982 (ratified by 33 countries); Convention No. 183 Maternity Protection, General Conference of the International Labour Organization, 88th Sess., adopted June 15, 2000 (ratified by 11 countries).

<sup>113</sup> Convention No. 158 Termination of Employment, *supra* note 112, at art. 5(d).

<sup>114</sup> Convention No. 183 Maternity Protection, *supra* note 112, at art. 9(2).

undoubtedly criticize the country for the occurrence of mandatory pregnancy testing at the SETISA factory in 2003.

*A. The Convention to Eliminate All Forms of Discrimination Against Women*

¶34 The Convention to Eliminate All Forms of Discrimination Against Women entered into force in Honduras on April 2, 1983.<sup>115</sup> In 1992, the CEDAW Committee considered jointly the country's initial, second and third periodic reports.<sup>116</sup> When it examined these reports, the Committee noted with approval that the Honduran Government had responded to CEDAW by establishing a policy to enhance the status of women and by amending several laws in their favor.<sup>117</sup> Even though Honduras implemented new laws, the Committee warned that "a change in legislation was not sufficient for combating discrimination against women" and emphasized the need for concrete measures, such as a national machinery or a plan of action, to implement the laws.<sup>118</sup> The Committee not only found that Honduras lacked a national machinery but it also discovered that Honduran employers discriminated against women based on pregnancy because they would "often ascertain, prior to contracting a woman, whether or not she was pregnant."<sup>119</sup> In response to these findings, the Committee advised Honduras to endorse macro-level changes designed "to promote the advancement of women, the dissemination of the Convention and its implementation."<sup>120</sup> Specifically, the Committee encouraged the country to develop an effective national machinery and to "take strong measures to eliminate old stereotypes curtailing the role of women and address consciousness-raising campaigns to both women and men to allow women to contribute effectively to society."<sup>121</sup>

¶35 Honduras' fourth, fifth and sixth periodic reports to the CEDAW Committee are all overdue: the fourth was due in 1996, the fifth in 2000, and the sixth in 2004.<sup>122</sup> If the CEDAW Committee were to consider the situation in Honduras today, it would likely commend the government for passing legislation that prohibits pregnancy testing as a condition of employment,<sup>123</sup> but it would undoubtedly criticize the country for allowing SETISA to violate its female employees' right to work and their rights to informed consent and dignity in health care. In 2000, the Honduran National Congress passed *La Ley de Igualdad de Oportunidades para la Mujer* (the Law of Equal Opportunities for Women), the purpose of which was to eliminate all forms of discrimination against

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<sup>115</sup> Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principle International Human Rights Treaties*, at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last modified June 3, 2005) [hereinafter *Status of Ratifications*].

<sup>116</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Honduras*, 11th Sess., U.N. DOC. A/47/38 (Jan. 24, 1992).

<sup>117</sup> *Id.* ¶ 110.

<sup>118</sup> *Id.* ¶ 112.

<sup>119</sup> *Id.* ¶ 134.

<sup>120</sup> *Id.* ¶ 110.

<sup>121</sup> *Id.* ¶ 143.

<sup>122</sup> United Nations Treaty Body Database, *Report Status by Country: Honduras*, available at <http://www.unhchr.ch/tbs/doc.nsf> (last visited Sept. 30, 2005).

<sup>123</sup> *La Ley de Igualdad de Oportunidades para la Mujer*, arts. 46, 51, Decreto 34-2000 (April 28, 2000), published in LA GACETA: DIARIO OFICIAL DE LA REPUBLICA DE HONDURAS NO. 29177, May 22, 2000.

women and to establish the legal equality of men and women.<sup>124</sup> The law provides for equal employment opportunities for women, prohibits employment discrimination based on sex or pregnancy, and explicitly states that employers may not require a negative pregnancy test on hiring nor may they fire a woman merely for being pregnant.<sup>125</sup> Although some might argue that this law discriminates against women by singling them out for special treatment, Article Four of CEDAW provides that “[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.”<sup>126</sup>

¶36 Although the CEDAW Committee would approve of Honduras’s efforts to eliminate discrimination against women through *La Ley de Igualdad de Oportunidades para la Mujer*, it would find the non-enforcement of the provision against pregnancy testing to constitute “‘discrimination of effect’ as defined in article one of the Convention.”<sup>127</sup> The Committee would recommend that the Honduran Government take measures to fully implement existing legislation, such as promoting stronger codes of conduct for private employers, strengthening the enforcement powers of labor inspection authorities, and proactively investigating alleged violations of women’s human rights.<sup>128</sup>

¶37 Under CEDAW, it is not enough for States parties to take legal action; rather they must take all measures necessary to effectively protect women from discrimination.<sup>129</sup> One non-legal measure already implemented in Honduras is the use of public information and educational campaigns designed to inform women of their rights, as recommended by the CEDAW Committee’s tenth general recommendation.<sup>130</sup> Two Honduran governmental organizations, *El Instituto Nacional de la Mujer* (the National Institute of Women) and *El Comisionado Nacional de los Derechos Humanos* (the National Commissioner for Human Rights), as well as various non-governmental organizations educate the public on human rights. In 1999, the Honduran National Congress created *El Instituto Nacional de la Mujer* to work toward equality of the sexes in Honduras,<sup>131</sup> and *El Instituto* implemented a radio campaign to familiarize Hondurans with the human rights of women.<sup>132</sup> *El Comisionado Nacional de los Derechos Humanos* instituted *El Programa Especial de los Derechos de la Mujer* (Special Program on the Rights of Women) in 2002, the purpose of which is to protect and promote the human rights of Honduran women.<sup>133</sup> One of the early goals of *El Programa Especial* was to develop campaigns aimed at informing the public of the rights of women.<sup>134</sup>

<sup>124</sup> *Id.* at art. 2.

<sup>125</sup> *Id.* at art. 46, 51.

<sup>126</sup> CEDAW, *supra* note 34, at art. 4.

<sup>127</sup> *See Guatemala*, *supra* note 88.

<sup>128</sup> *Id.* ¶ 187; *Colombia*, *supra* note 85.

<sup>129</sup> CEDAW, *supra* note 34, at art. 2; Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, ¶ 24(t), 11th Sess., U.N. DOC. A/47/38 (Jan. 29, 1992).

<sup>130</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 10*, *supra* note 80, ¶ 1.

<sup>131</sup> *La Ley del Instituto Nacional de la Mujer (INAM)*, art. 2, Decreto No. 232-98 (Sept. 30, 1998), published in LA GACETA: DIARIO OFICIAL DE LA REPUBLICA DE HONDURAS No. 28798, Feb. 11, 1999.

<sup>132</sup> EL INSTITUTO NACIONAL DE LA MUJER DE HONDURAS, MEMORIA INSTITUCIONAL 2003 28, *available at* <http://www.inam.gob.hn/documentos/memoria2003.zip> (last visited Aug. 23, 2005).

<sup>133</sup> EL COMISIONADO NACIONAL DE LOS DERECHOS HUMANOS, INFORME ANUAL 2002 18, *available at*



¶38 While the government's informational campaigns have been addressed primarily to Honduran society at-large, a variety of NGOs have engaged in efforts directed specifically at women workers. Since 1993, *Colectiva de Mujeres Hondureñas* (Honduran Women's Collective), also known as CODEMUH, has organized workshops for women maquila workers designed to promote awareness of women's rights.<sup>135</sup> In 2001 and 2002, another Honduran NGO, *Asociación Andar*, endeavored to increase women's knowledge of their rights through such tools as a media campaign, the production and distribution of a summary of the laws on women's rights, and negotiation workshops with women workers.<sup>136</sup> Finally, *Centro de Derechos de Mujeres* (the Women's Rights Center) develops educational programs for female maquila workers that are designed to improve working conditions.<sup>137</sup>

¶39 The CEDAW Committee has recommended that States parties use public information and educational campaigns not only to inform women of their rights but also to "eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women."<sup>138</sup> In Honduras, the *machismo* culture common among Latin American countries is strong and contributes to the inferior role of women.<sup>139</sup> To counteract this, the workshops organized by CODEMUH not only inform women maquila workers of their rights but also use education and a feminist perspective to break down cultural stereotypes.<sup>140</sup>

¶40 Although the CEDAW Committee would commend the Honduran governmental and non-governmental organizations for undertaking these public information and education campaigns, the Committee would also encourage the country to implement further measures. First, in addition to targeting women, educational efforts should be directed specifically at Honduran men, because they play a large role in perpetuating the subordinate role of women; true equality between men and women cannot be achieved until Honduran men change their attitudes and behaviors. Second, more efforts must be made to reach the women working in the maquiladora industry. In particular, the governmental agencies *El Instituto Nacional de la Mujer* and *El Comisionado Nacional de los Derechos Humanos* should add campaigns directed at women workers to their efforts aimed at the general public. Women maquila workers must be informed of their rights under domestic and international law. Finally, improving the status of women in Honduras requires large societal changes to eliminate prejudices and discriminatory practices, which cannot be accomplished by one NGO on its own. NGOs and governmental organizations must join CODEMUH in its efforts to counteract Honduras' machismo culture.

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<http://www.conadeh.hn/informe/anual2002/presentacion.htm> (last visited Sept. 30, 2005).

<sup>134</sup> *Id.*

<sup>135</sup> Peace Women, Women, Peace and Security Initiatives: Honduras, at <http://www.peacewomen.org/campaigns/Honduras/initiatives.html> (last visited Sept. 30, 2005).

<sup>136</sup> *Id.*

<sup>137</sup> Centro de Derechos de Mujeres, Programas de trabajo, objetivos específicos y principales actividades, at <http://ns.rds.org.hn/cdm/html/programas.html> (last visited Sept. 30, 2005).

<sup>138</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 3*, *supra* note 79.

<sup>139</sup> Facusse, *supra* note 37.

<sup>140</sup> Mandy MacDonald, CODEMUH: Developing a Holistic Approach to Women's Rights, at <http://www.cawn.org/newsletter/update/codemuh.htm> (last visited Sept. 30, 2005).

### B. *The International Covenant on Civil and Political Rights*

¶41 Honduras ratified the ICCPR on November 25, 1997.<sup>141</sup> Although all States parties are required to submit an initial report within one year of ratification, Honduras did not submit its first report until early 2005.<sup>142</sup> The Human Rights Committee acknowledged receipt of this report but has not yet scheduled a time for its consideration.<sup>143</sup> Even though Honduras's initial report does not mention pregnancy testing as a condition of employment,<sup>144</sup> SETISA's practice of mandatory pregnancy testing would cause the Human Rights Committee great concern because it violates women's rights to equality and privacy guaranteed by the ICCPR.

¶42 Although pregnancy testing is illegal under *La Ley de Igualdad de Oportunidades para la Mujer*,<sup>145</sup> the Human Rights Committee would criticize the Honduran Government for its lack of enforcement of the law and the lack of remedy available to women whose rights have been violated, as required by the ICCPR's "positive action" requirement.<sup>146</sup> In addition to urging Honduras to improve these legal defects, the Human Rights Committee would comment on the country's non-legislative measures. It would commend Honduras for complying with its recommendation that States parties ensure that the government is educated in human rights,<sup>147</sup> since *El Instituto Nacional de la Mujer* promotes the human rights of women among various parts of the Honduran government.<sup>148</sup> Additionally, the Human Rights Committee would recommend that Honduras remove obstacles to women's equal enjoyment of rights established in the ICCPR.<sup>149</sup> The Committee would urge the country to try to overcome "traditional, historical, religious or cultural attitudes"<sup>150</sup> that impede women's equality through measures such as public information and education campaigns that focus on overcoming discriminatory cultural attitudes.<sup>151</sup>

### C. *The International Covenant on Economic, Social and Cultural Rights*

¶43 Honduras ratified the ICESCR on May 17, 1981, and has complied with the Committee's reporting requirements thus far.<sup>152</sup> In May 2001, the Committee examined the country's first report and was pleased by Honduras's assertion that "the Covenant [on Economic, Social and Cultural Rights] is part of national law and that it can be invoked before a court of law."<sup>153</sup> With regard to the maquiladora industry, the Committee

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<sup>141</sup> *Status of Ratifications*, *supra* note 115.

<sup>142</sup> United Nations Treaty Body Database, *supra* note 122.

<sup>143</sup> Human Rights Committee, *Provisional Agenda and Annotations*, 4, 83rd Sess., U.N. DOC. CCPR/C/155 (Jan. 28, 2005).

<sup>144</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant; Initial Report: Honduras*, U.N. Doc. CCPR/C/HND/2005/1 (Feb. 21, 2005).

<sup>145</sup> *La Ley de Igualdad de Oportunidades para la Mujer*, *supra* note 123.

<sup>146</sup> ICCPR, *supra* note 59, at art 2(1).

<sup>147</sup> Human Rights Committee, *General Comment 28*, *supra* note 95, ¶ 3.

<sup>148</sup> *La Ley del Instituto Nacional de la Mujer (INAM)*, *supra* note 131, at art. 7.

<sup>149</sup> Human Rights Committee, *General Comment 28*, *supra* note 95, ¶ 3.

<sup>150</sup> *Id.* ¶ 5.

<sup>151</sup> *Id.*

<sup>152</sup> United Nations Treaty Body Database, *supra* note 122.

<sup>153</sup> Committee on Economic, Social and Cultural Rights, *Concluding Comments: Honduras*, ¶ 3, 25th Sess., U.N. DOC. E/C.12/1/Add.57 (May 9, 2001).

expressed concern about the lack of Government action “to control the negative effects of transnational companies’ activities on the employment and working conditions of Honduran workers and to ensure compliance with national labour legislation.”<sup>154</sup>

¶44

Although the Committee did not specifically mention mandatory pregnancy testing when considering Honduras’s first report, it would denounce the practice at the SETISA factory as a violation of the ICESCR. The Committee on Economic, Social and Cultural Rights has objected to pregnancy testing as a condition of employment because it undermines women’s rights protected by the Covenant, including equal enjoyment of the right to work. Although Honduran law forbids pregnancy testing, the Committee stressed in General Comment No. 3 that a State party that does no more than adopt legislative measures does not fulfill its treaty obligations.<sup>155</sup> Honduras must implement other “appropriate means,” including the provision of judicial remedies<sup>156</sup> as well as “administrative, financial, educational, and social measures.”<sup>157</sup> The Committee would likely insist that the Honduran Government take *immediate* action<sup>158</sup> to protect the rights of maquila workers and thus ensure compliance with the ICESCR.

#### D. The International Labour Organization (ILO)

¶45

Honduras is a member State of the ILO.<sup>159</sup> Among the three Conventions cited by the ILO in opposition to pregnancy testing as a condition of employment, Honduras has ratified only one, Convention No. 111 concerning Discrimination (Employment and Occupation).<sup>160</sup> Even if Honduras had not ratified this Convention, however, it would be required to abide by it as a fundamental principle of the ILO, as defined in the Declaration on Fundamental Principles and Rights at Work.<sup>161</sup> As required by the Discrimination Convention, Honduras has established a national policy to eliminate discrimination based on sex and to promote equal opportunity and treatment between men and women in employment and occupation.<sup>162</sup> Although *La Ley de Igualdad de Oportunidades para la Mujer* forbids pregnancy testing, the law has not been enforced effectively and the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) would likely find Honduras to be in violation of Convention No. 111.

¶46

Unfortunately, however, the ILO’s enforcement mechanisms are limited.<sup>163</sup> Even if the CEACR finds that Honduras violated the Discrimination Convention by permitting mandatory pregnancy testing at SETISA, it could do little more than emphasize that the practice constitutes discrimination based on sex and “trust[] that the Government [would]

<sup>154</sup> *Id.* ¶ 15.

<sup>155</sup> Committee on Economic, Social and Cultural Rights, *General Comment 3*, *supra* note 100, ¶ 4.

<sup>156</sup> *Id.* ¶ 5.

<sup>157</sup> *Id.* ¶ 7.

<sup>158</sup> See *Mexico-CESCR*, *supra* note 101.

<sup>159</sup> International Labour Organization, Alphabetical List of ILO Member Countries (178 countries), *supra* note 105.

<sup>160</sup> International Labour Organization, Ratifications for C111 Discrimination (Employment and Occupation) Convention, 1958, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> (ILOLEX database).

<sup>161</sup> *Declaration on Fundamental Principles and Rights at Work*, *supra* note 106, at art. 2.

<sup>162</sup> *La Ley de Igualdad de Oportunidades para la Mujer*, *supra* note 123, at art. 2.

<sup>163</sup> International Labour Organization, *Constitution*, *supra* note 105, at arts. 24-34.

take appropriate measures to investigate and eliminate such discriminatory practices and thus bring their legislation and practice into conformity with the Convention.”<sup>164</sup>

#### VI. ADDITIONAL STEPS MUST BE TAKEN TO PROTECT THE HUMAN RIGHTS OF WOMEN MAQUILA WORKERS

¶47 Mandatory pregnancy testing violates both Honduran domestic law and international human rights law as defined by CEDAW, the ICCPR, the ICESCR, and the ILO, yet this practice occurred unimpeded at the SETISA factory. Domestic laws were not enforced, and existing international mechanisms failed to effectively enforce treaty provisions. International human rights bodies can and should do more to protect Honduran women workers. Also, NGOs like the Workers’ Rights Consortium and the Fair Labor Association should press for stricter private codes of conduct for transnational corporations and implement more “name and shame” campaigns to inform American consumers about human rights violations in factories like SETISA.

##### A. *Special Rapporteur of the Commission on Human Rights on Violence against Women*

¶48 In 1994, the Commission on Human Rights appointed a Special Rapporteur on violence against women, and this mandate was extended in 2003.<sup>165</sup> The mission of the Special Rapporteur is to investigate violence against women, including its causes and consequences; to recommend measures to eliminate violence against women and its causes; to remedy the consequences of violence against women; and to work with UN treaty bodies and other groups to ensure that their reports contain information on the violation of women’s human rights.<sup>166</sup>

¶49 The Special Rapporteur uses the definition of “violence against women” provided in the Declaration on the Elimination of Violence against Women, which states that violence against women consists of “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>167</sup> The term “violence against women” encompasses physical, sexual, and psychological violence occurring in the family and within the general community, as well as any physical, sexual, and psychological violence “perpetrated or condoned by the state, wherever it occurs.”<sup>168</sup>

¶50 Although the Declaration on the Elimination of Violence against Women does not discuss pregnancy testing as a condition of employment, this practice constitutes a form of violence against women which is prohibited by the Declaration and thus within the

<sup>164</sup> *Mexico-CEACR*, *supra* note 110, ¶ 5.

<sup>165</sup> Office of the United Nations High Commissioner for Human Rights, Special Procedures of the Commission on Human Rights: Special Rapporteur of the Commission on Human Rights on Violence Against Women, Its Causes and Consequences: Introduction, at <http://www.unhcr.ch/html/menu2/7/b/women/index.html> (last visited Sept. 30, 2005).

<sup>166</sup> UN Econ. and Soc. Council [ECOSOC], Comm’n on Human Rights Res. 1994/45, ¶ 7, 50th Sess., U.N. DOC. E/CN.4/1994/132 (March 4, 1994).

<sup>167</sup> Declaration on the Elimination of Violence Against Women, art. 1, G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. DOC. A/RES/48/104 (1993); Comm’n on Human Rights Res. 2003/45, ¶ 4, 59th Sess., U.N. DOC. E/CN.4/RES/2003/45 (April 23, 2003) (adopted without a vote).

<sup>168</sup> Declaration on the Elimination of Violence Against Women, *supra* note 167, at art. 2.

purview of the Special Rapporteur on violence against women. Mandatory pregnancy testing constitutes a gender-based act that causes psychological harm to women workers. It is also a form of “sexual harassment or intimidation at work,” which the Declaration describes as a type of violence against women that occurs within the general community.<sup>169</sup> Additionally, Article Three of the Declaration guarantees women the equal enjoyment and protection of all human rights, including “[t]he right to just and favourable conditions of work.”<sup>170</sup>

¶51 By subjecting women to mandatory pregnancy testing when applying for a job and again two months later, the SETISA factory attempted to coerce and intimidate women into choosing not to become pregnant or into having abortions so that the factory did not have to pay for medical expenses and maternity leave, as required under domestic and international law.<sup>171</sup> Without a doubt, such coercion and intimidation could cause women workers great psychological harm by forcing them to decide between controlling their own fertility and remaining employed in a country with a high unemployment rate.<sup>172</sup> Forcing women to make such a decision also violates their rights to just and favorable conditions of work.

¶52 If the Special Rapporteur on violence against women were to investigate the practice of pregnancy testing as a condition of employment, she could act more quickly than the individual treaty bodies discussed above and she could collect first-hand knowledge rather than relying on the Government to be forthright in its reports. Rather than waiting for the country to submit its overdue reports, the Special Rapporteur could undertake a fact-finding visit to Honduras to examine working conditions in the maquila factories and to collect information on the practice of pregnancy testing. Since Honduras has not ratified either the Optional Protocol to CEDAW or the First Optional Protocol to the ICCPR,<sup>173</sup> individual Honduran women whose rights have been violated currently have no recourse under international human rights law. If, however, the Special Rapporteur considered pregnancy testing to constitute violence against women, then individuals could submit their cases directly to the Special Rapporteur for investigation.<sup>174</sup> Therefore, utilizing the Special Rapporteur on violence against women to combat mandatory pregnancy testing would produce more successful results than the UN treaty bodies alone.

#### *B. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*

¶53 Another way in which international human rights law can better protect the human rights of Honduran maquila workers is through the transnational corporations (TNCs) that run factories like SETISA. Honduras is a very poor country whose economy relies on foreign direct investment. As a way to attract foreign investment, developing countries like Honduras establish low-wage export industries, such as the maquiladora

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<sup>169</sup> *Id.* at art. 2(b).

<sup>170</sup> *Id.* at art. 3(g).

<sup>171</sup> Greenhouse, *supra* note 23.

<sup>172</sup> CENTRAL INTELLIGENCE AGENCY, *supra* note 1.

<sup>173</sup> *Status of Ratifications*, *supra* note 115.

<sup>174</sup> Office of the United Nations High Commissioner for Human Rights, *supra* note 165.

industry, for use by foreign industrial interests.<sup>175</sup> Even though TNCs are often exempt from paying many duties and taxes,<sup>176</sup> they tend to exert pressure on the governments of developing countries to maintain low labor standards.<sup>177</sup> Since it is vital for these governments to attract and maintain foreign direct investment, they cannot be relied upon to effectively recognize and protect workers' rights. Acknowledging this fact, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms).<sup>178</sup> This document establishes that TNCs and other business enterprises<sup>179</sup> must play a role in protecting the human rights of all of their employees.<sup>180</sup>

¶54 The Norms obligate TNCs "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."<sup>181</sup> Commenting on this norm, the Sub-Commission on the Promotion and Protection of Human Rights explained that TNCs are responsible for ensuring that they do not, directly or indirectly, contribute to or benefit from human rights abuses.<sup>182</sup> The Sub-Commission established a negligence standard, providing that TNCs will be held responsible only if they were aware of or should have been aware of the abuses from which they benefited or to which they contributed.<sup>183</sup>

¶55 The Norms provide that TNCs should ensure the rights to equal opportunity and non-discriminatory treatment and should prohibit discrimination based on sex.<sup>184</sup> Although the commentary provided by the Sub-Commission does not explicitly declare pregnancy testing as a condition of employment to be a form of sex discrimination, it can be inferred: pregnancy is listed as a status on the basis of which discrimination should be eliminated; discrimination is defined as "any distinction, exclusion, or preference made on the above-stated bases;" and the policies of TNCs that must be non-discriminatory include "those relating to recruitment [and] hiring."<sup>185</sup> Therefore, the use of pregnancy

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<sup>175</sup> Juan Carlos Linares, *The Development Dilemma: Reconciling US Foreign Direct Investment in Latin America with Laborers' Rights: A Study of Mexico, the Dominican Republic and Costa Rica*, 29 N.C. J. INT'L L. & COM. REG. 249, 251 (2003).

<sup>176</sup> Honduran Apparel Manufacturers Association, Incentives, at <http://www.ahm-honduras.com/html/incentives.html> (2003).

<sup>177</sup> Linares, *supra* note 175, at 252.

<sup>178</sup> UN Econ. and Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Res. 2003/16, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/L.11 (Aug. 13, 2003).

<sup>179</sup> UN Econ. and Soc. Council [ECOSOC], Although all norms apply to both TNCs and other business enterprises, this section will discuss the application of the norms to TNCs only, since they tend to run maquila factories.

<sup>180</sup> UN Econ. and Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *Norms*].

<sup>181</sup> *Id.* ¶ 1.

<sup>182</sup> Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1 cmt. (b), 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter *Commentary*].

<sup>183</sup> *Id.*

<sup>184</sup> *Norms*, *supra* note 180, ¶ 2.

<sup>185</sup> *Commentary*, *supra* note 182, ¶ 2 cmts. (a)-(c).

tests as a condition of employment discriminates against women and thus violates the Norms.

¶56 Under the Norms, TNCs are responsible for implementing internal rules of operation that are consistent with the standards described in the document.<sup>186</sup> Once internal rules have been adopted, the TNCs must disseminate them in the language of the workers in both oral and written form.<sup>187</sup> As part of the implementation measures, TNCs are responsible for providing workers and managers with training in practices relevant to the Norms.<sup>188</sup> In addition, TNCs must provide workers with a confidential complaint mechanism so that they can report violations of the Norms.<sup>189</sup> Once a complaint has been filed, the TNC is responsible for investigating alleged violations<sup>190</sup> and providing victims with adequate reparation in response to situations in which Norms are found to have been violated.<sup>191</sup> Finally, TNCs are required to “periodically report on and take other measures to fully implement the Norms” as part of the implementation process.<sup>192</sup>

¶57 Although the Norms constitute an important step towards establishing corporate accountability for human rights abuses, they do not contain binding monitoring mechanisms. Companies may institute voluntary initiatives to comply with the Norms, but according to the UN Commissioner on Human Rights, “[e]nsuring that business respects human rights is first a matter of State action at the domestic level.”<sup>193</sup> States that have ratified various international instruments, such as CEDAW, the ICCPR, the ICESCR, and ILO Conventions, have already agreed to protect the rights of individuals against third parties, including business entities, and therefore can be held responsible under international human rights law for failing to do so. However, because existing international human rights law is insufficient in situations where the State is unwilling or unable to protect human rights, the UN should make the Norms binding or promulgate an instrument establishing the legal responsibilities of business entities with regard to protecting human rights.<sup>194</sup> The TNCs that contract with and own factories like SETISA have greater power to improve factory conditions than their host countries, which are poor and dependent on foreign direct investment. Therefore, although the Norms are a step in the right direction, the human rights of maquila workers will not be effectively protected until international human rights law holds TNCs accountable for their actions.

### C. Involvement of NGOs

¶58 Outside the realm of international human rights law, non-governmental organizations play a vital role in protecting the human rights of maquila workers. As described previously, the sweatshop movement of the 1990s was started and led by

<sup>186</sup> Norms, *supra* note 180, ¶ 15.

<sup>187</sup> Commentary, *supra* note 182, ¶ 15 cmt. (a).

<sup>188</sup> *Id.* ¶ 15 cmt. (b).

<sup>189</sup> *Id.* ¶ 16 cmt. (e).

<sup>190</sup> *Id.* ¶ 16 cmt. (f).

<sup>191</sup> Norms, *supra* note 180, ¶ 18.

<sup>192</sup> *Id.* ¶ 15.

<sup>193</sup> UN Econ. and Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Sub-Commission on the Promotion and Protection of Human Rights*, ¶ 43, 61st Sess., U.N. DOC. E/CN.4/2005/91 (Feb. 15, 2005).

<sup>194</sup> *Id.* ¶ 49.

NGOs like Human Rights Watch and Sweatshop Watch.<sup>195</sup> The efforts of these organizations helped to draw the attention of UN human rights bodies to the practice of pregnancy testing as a condition of employment.<sup>196</sup> Today, NGOs work to prevent human rights violations by promulgating internal codes of conduct and by using “name and shame” campaigns to encourage US consumers to boycott a product if human rights were violated in its production.

¶59 By the end of the 1990s, the anti-sweatshop movement had caused most apparel companies to adopt internal codes of conduct and many companies hired monitors to verify contractor compliance with these codes.<sup>197</sup> Unfortunately, however, these voluntary codes of conduct often consisted of weak standards and even weaker enforcement mechanisms.<sup>198</sup> To make up for these deficiencies and to compensate for the lack of enforcement of ILO Conventions, codes of conduct were adopted by NGOs, such as the Fair Labor Association (FLA) and Worker Rights Consortium (WRC), both of which are active in Honduras.

¶60 A transnational company that joins the FLA must agree to adopt the FLA Code of Conduct; to implement a strategy of comprehensive compliance, including internal monitoring; and to allow external monitors to evaluate their facilities for compliance with the Code.<sup>199</sup> In exchange, the FLA provides information to consumers about the compliance record of participating companies, based on the notion that market forces will reward companies that protect human rights.<sup>200</sup> The FLA Code of Conduct does not explicitly mention pregnancy testing, but it would be forbidden under the FLA Code’s broad prohibition of sex discrimination.<sup>201</sup>

¶61 The Worker Rights Consortium also established a code of conduct to protect the human rights of workers, but its efforts are directed at colleges and universities rather than at TNCs. A college or university that affiliates with the WRC is required to adopt a manufacturing code of conduct and incorporate this code into contracts with licensees.<sup>202</sup> The WRC helps colleges and universities enforce these codes of conduct through assessment of working conditions at the licensees’ factories, like SETISA.<sup>203</sup> The WRC’s Model Code of Conduct, which serves as the basis of all WRC investigations of factory conditions, explicitly states that women workers may not be subjected to pregnancy tests as a condition of employment.<sup>204</sup> Therefore, any licensee of a college or university

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<sup>195</sup> See *supra* text accompanying notes 73 and 74.

<sup>196</sup> See e.g., HUMAN RIGHTS WATCH, *supra* note 74.

<sup>197</sup> Katie Quan, *Strategies for Garment Worker Empowerment in the Global Economy*, 10 U.C. DAVIS J. INT’L L. & POL’Y 27 32 (Fall 2003).

<sup>198</sup> Douglass Cassel, *Human Rights and Business Responsibilities in the Global Market Place*, 11 BUSINESS ETHICS QUARTERLY 261(2001).

<sup>199</sup> Fair Labor Association, *What We Do*, at <http://www.fairlabor.org/all/about/whatwedo.html> (last visited Sept. 30, 2005).

<sup>200</sup> *Id.*

<sup>201</sup> Fair Labor Association, *Workplace Code of Conduct*, at <http://www.fairlabor.org/all/code/index.html> (last visited Sept. 30, 2005).

<sup>202</sup> Worker Rights Consortium, *Frequently Asked Questions*, at [http://www.workersrights.org/about\\_faq.asp](http://www.workersrights.org/about_faq.asp) (last visited Sept. 30, 2005).

<sup>203</sup> *Id.* In June 2005, SETISA was producing University of Wisconsin apparel, a school affiliated with the WRC. Worker Rights Consortium, *Factory Disclosure Database*, *supra* note 12.

<sup>204</sup> Worker Rights Consortium, *Frequently Asked Questions*, *supra* note 202.



affiliated with the WRC may not use mandatory pregnancy tests to discriminate against women.

¶62 In addition to promulgating codes of conduct among transnational corporations and schools of higher education, NGOs engage in large-scale public campaigns to engage the power of the consumer in support of workers' rights. In fact, such "name and shame" campaigns have been the main strategy of the anti-sweatshop movement.<sup>205</sup> By informing the public that companies like Nike or Sean John Clothing violate the human rights of workers abroad, NGOs create public outrage that leads to mass boycotting, which ultimately convinces the company to pay attention to workers' rights.<sup>206</sup> American consumers have indicated that they are willing to spend more money on products manufactured under good working conditions, so a company that protects workers' human rights abroad can profit greatly.<sup>207</sup>

¶63 In October 2003, the National Labor Committee (NLC) utilized a "name and shame" campaign to draw attention to the violations of workers' rights that occurred at SETISA while the factory was manufacturing t-shirts for Sean John Clothing. The NLC capitalized on the celebrity of Sean Combs (a.k.a. "Diddy"), the Chairman and CEO of Sean John Clothing, Inc., to publicize its findings of poor working conditions and mandatory pregnancy testing. Combs initially said he would terminate his company's relationship with the SETISA factory if the allegations were true,<sup>208</sup> but the NLC encouraged him to maintain Sean John production in the factory and to use his influence to demand strict compliance with Honduran labor laws.<sup>209</sup> Combs relented and insisted that working conditions be improved at the SETISA factory. As a result, factory conditions have improved and women are no longer required to take a pregnancy test as a condition of employment.<sup>210</sup> The NLC was not completely satisfied, however, and has urged Combs to send inspectors to his other factories in Thailand and Vietnam to ensure the protection of human rights for all workers making Sean John Clothing.<sup>211</sup>

## VII. CONCLUSION

¶64 SETISA's former practice of pregnancy testing as a condition of employment violated both Honduran and international human rights law, yet continued unimpeded until the NLC got involved. Although NGOs play a vitally important role in protecting human rights around the world, the United Nations must increase its efforts to protect the human rights of women workers and to enforce international labor standards more effectively. Progress has certainly been made through the establishment of a Special Rapporteur on violence against women and through the adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with

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<sup>205</sup> Quan, *supra* note 197, at 33.

<sup>206</sup> Linares, *supra* note 175, at 288.

<sup>207</sup> *Id.* at 281.

<sup>208</sup> Dan Tapscott, *Change Agent: Time of Transparency*, INTELLIGENT ENTERPRISE, June 12, 2004, at 12.

<sup>209</sup> Letter from the National Labor Committee in Support of Worker and Human Rights to Sean Combs, *supra* note 14.

<sup>210</sup> Telephone Interview with Tomas Donoso, Research Associate, National Labor Committee for Worker and Human Rights (Dec. 12, 2004).

<sup>211</sup> *Id.* See also National Labor Committee in Support of Worker and Human Rights, Sean John's Sweatshops, *supra* note 15.

Regard to Human Rights. However, international human rights law must prioritize the protection of women workers, especially those faced with economic hardship and discriminatory employers.